In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 203

EUGENE ELLSWORTH AYOTTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

Petitioner was convicted in the United States District Court for the Eastern District of Michigan of conspiracy to violate the bankruptcy laws in violation of 18 U.S.C. 371 and of concealing assets in violation of 18 U.S.C. 152. The court of appeals affirmed (Pet. App. A 10-12).

The sole question presented to this Court relates to the procedure on appeal. On December 8, 1966, oral

argument was heard in the United States Court of Appeals for the Sixth Circuit, before Judges Edwards, Cecil, and Celebrezze (R. 17).[1] When the case was called for argument, Judge Edwards revealed to the parties that he had been Police Commissioner of the City of Detroit at the time some of the acts involved in the indictment were committed and offered to recuse himself. Petitioner's counsel raised no objection at that time to having Judge Edwards hear and decide the case (R. 6-7, 12).

Approximately one month later, the same counsel moved to have Judge Edwards disqualified on the ground of prejudice. The motion stated that the judge was Police Commissioner of Detroit at the time of the commission of the offenses here involved; that as Police Commissioner he had caused an investigation of petitioner and some of his associates to be conducted; and that he had made certain statements concerning petitioner's connection with the Mafia (R. 3-4, 17-18).

Chief Judge Weick subsequently entered an order denying the motion. He stated that there was no showing that Judge Edwards had any substantial interest in the case, that the objection was not timely raised, and that there had been an express waiver of objection at the oral argument (R. 7-8; Pet. App. A 8-9). The same day, Judge Edwards recused himself from further participation in the case for the reason that he had been Police Commissioner at the

[1] "R." refers to the certified record filed with the Clerk of this Court; there is no transcript of the oral argument.

time some of the events of the case had occurred (R. 12; Pet. App. A 10). Three months after oral argument, the decision of the court affirming the conviction was announced, Judge Edwards not participating (R. 14). Motions to set aside the order affirming the conviction and to reassign the appeal for rehearing, based on the alleged bias of Judge Edwards, were denied (R. 22; Pet. App. A 13).

Petitioner's claim that the judicial atmosphere in the Sixth Circuit was tainted and thus deprived him of a fair and impartial review of his appeal is without foundation. It is difficult to perceive how a judge who did not participate in the decision of a case (although he did hear oral argument) could affect the decision-making of the two judges who did render the decision so as to deprive the petitioner of the right to a fair and impartial review. Nor is there any showing that Judge Edwards had any substantial interest in the case.[2] See *United States* v. *Bell*, 351 F. 2d 868 (C.A. 6), certiorari denied, 383 U.S. 947. The mere fact that a judge has had some contact with the defendant before him, by virtue of an office previously held, does not constitute grounds for disqualification on account of bias. See *Neil* v. *United States*, 205 F. 2d 121 (C.A. 9); *Adams* v. *United States*, 302 F. 2d 307 (C.A. 5).

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[2] Thus, as correctly concluded by Chief Judge Weick (Pet. App. A 9), the statute dealing with disqualification of federal judges, 28 U.S.C. 455, has no application here.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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BEATRICE ROSENBERG,
Attorney.

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